

**IN THE COURT OF APPEALS 10/15/96**  
**OF THE**  
**STATE OF MISSISSIPPI**  
**NO. 93-KA-00341 COA**

**RICHARD A. BOOTH A/K/A RICHARD NELSON**

**APPELLANT**

**v.**

**STATE OF MISSISSIPPI**

**APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND  
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. ROBERT G. EVANS

COURT FROM WHICH APPEALED: JASPER COUNTY CIRCUIT COURT

ATTORNEY(S) FOR APPELLANT: THOMAS J. LOWE, JR., JOHN N. SATCHER

ATTORNEY(S) FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: SCOTT STUART

DISTRICT ATTORNEY(S): RICHARD WILEY WEBB

NATURE OF THE CASE: CRIMINAL - TRANSFER OF MARIJUANA

TRIAL COURT DISPOSITION: CONVICTED AND SENTENCED TO SERVE TWO (2)  
YEARS IN THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND TO PAY ALL COSTS  
AND ASSESSMENTS AND TO PAY A CRIME LAB FEE OF \$450.00, ALL COSTS TO BE  
PAID IN FULL WITHIN SIXTY (60) DAYS OF RELEASE FROM THE MDOC.

BEFORE FRAISER, P.J., KING, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

Richard A. Booth, a/k/a Richard Nelson, was indicted and tried for the transfer of less than one ounce of marijuana to an undercover officer. The jury subsequently convicted Booth, and the court sentenced him to serve two years in the custody of the Mississippi Department of Corrections and to pay all costs and a crime lab fee of \$450.00 within sixty days of his release from custody. We find that his issues on appeal have no merit and therefore affirm.

#### FACTS

James Kitchens, an undercover police officer, went to a local pool hall in late April 1990, with a man named Robert Harrison to buy illegal drugs. Kitchens wore a body wire and microphone for audiotaping any drug buy conversations. Booth subsequently sold Kitchens a twenty dollar bag of marijuana that Booth pulled out of his sock.

Booth did not testify in his own defense, but four other witnesses did testify that either Booth's voice was not the voice on the audiotape, or that Booth had never been to the pool hall to play pool. The jury convicted Booth, and the court later denied his motion for JNOV or, in the alternative, a new trial. Booth now appeals on the issues below.

#### ISSUES AND ANALYSIS

##### I. DID THE TRIAL COURT ERR IN ADMITTING THE AUDIOTAPE OF THE MARIJUANA SALE AND THE TRIAL TESTIMONY OF HARRISON?

Booth contends that the court erred by allowing the State to use the audiotape of the alleged sale at trial, thereby violating the rules of discovery. He also argues that the court erred by allowing Harrison to testify against him. He argues that the State violated discovery rules when it failed to disclose Harrison's name until the day of trial. He believes that, due to these alleged errors, the court denied him the right to a fair trial.

The Uniform Criminal Rules of Circuit Court Practice stated that if the State, during trial, attempts to introduce evidence not timely disclosed to the defense, and the defense objects for that reason, the court shall grant the defense a reasonable opportunity to examine the newly produced evidence. Unif. Crim. R. Cir. Ct. Prac. 4.06(i)(1). If, after examination, the defense claims unfair

surprise or undue prejudice and requests a continuance or mistrial, the court shall either exclude the evidence, grant a continuance for a reasonable period of time to allow the defense to meet the new evidence, or grant a mistrial. *Id.* Moreover, this rule requires the prosecution to disclose to the defendant or the defendant's counsel the identity of all witnesses in chief proposed to be offered at trial. *Id.*

In the present case, the trial court told Booth that, if he desired a continuance, it would allow the State to decide whether or not to proceed without the audiotape or agree to the continuance. The

court allowed Booth to listen to the audiotape to determine if he needed additional time to defend against it. After listening to the tape, Booth decided to forego a continuance and to proceed to trial with the knowledge that the State could use the tape against him. We believe that the trial court properly offered Booth both time to review the audiotape and a continuance. Moreover, the court allowed Booth to present an amendment to his first opening statement to address the issue of the audiotape that the jury would likely hear. We find that the court correctly followed the applicable court rule, and that it therefore committed no error regarding the admission of the audiotape of the drug sale.

Booth also argues that the State violated discovery rules by providing Harrison's real name on the day of trial. Booth fails to cite authority on this sub-issue. However, it could be assumed that he desired to utilize the authority cited for the audiotape argument for this contention as well. If so, the record indicates that the only discussions regarding late discovery dealt with the audiotape, and not the timeliness of producing Harrison's real name.

The Mississippi Supreme Court has stated that it will not consider issues on appeal with no citation to authority. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993); *Armstrong v. Armstrong*,

618 So. 2d 1278, 1282 (Miss. 1993) (citations omitted); *Estate of Mason v. Fort*, 616 So. 2d 322, 327 (Miss. 1993) (citations omitted); *Smith v. Dorsey*, 599 So. 2d 529, 532 (Miss. 1992) (citations omitted). This Court likewise has the discretion to refuse consideration of issues without citation to authority. *Kelly v. State*, 553 So. 2d 517, 521 (Miss. 1989) (the court, in its discretion, may consider an assignment of error due to the novelty of the events surrounding it, even if a party fails to cite authority in support of that assignment).

The Mississippi Supreme Court has also held that a trial judge cannot be put in error if not given the opportunity to address an issue. *Robinson v. State*, 662 So. 2d 1100, 1104 (Miss. 1995) (citation omitted); *Ballenger v. State*, 667 So. 2d 1242, 1256, 1266 (Miss. 1995) (trial judge cannot be found to be in error on issue not presented for decision and defendant is procedurally barred where objection at trial was based on different grounds than those asserted on appeal). A complaining party must make a contemporaneous objection at trial in order to preserve an alleged error for appellate review. *King v. State*, 615 So. 2d 1202, 1205 (Miss. 1993) (citation omitted).

Here Booth failed to cite authority to support this sub-issue. Even if it is assumed that the same authority cited for the audiotape argument applies to the name identification argument, Booth clearly failed to address this point at trial. He cannot now argue this sub-issue on appeal because he failed to contemporaneously object to it at trial. We therefore find that both parts of Booth's issue have no merit.

## II. DID THE TRIAL COURT ERR IN ALLOWING THE STATE TO MAKE A CERTAIN STATEMENT DURING CLOSING ARGUMENT?

Booth argues that the court erred when it allowed the State to say in its closing argument that "until fair-minded jurors like yourselves are ready to stand up and say no more, not in our

community, not our children, until you are ready to do that, it's all for naught." Booth argues that this comment told the jurors that they could base their decision on factors that are legitimate concerns of all citizens, rather than on the law and the facts of the case. He contends that the State, in effect, told the jury that it could protect its community from drugs by voting guilty, and that the comment constituted reversible error.

The Mississippi Supreme Court has stated that when a jury is instructed that closing argument is not evidence and therefore instructed to disregard comments not supported by the evidence, an appellate court shall assume that the jury followed the instructions and disregarded the comment which was not supported by the evidence. *Davis v. State*, 660 So. 2d 1228, 1249 (Miss. 1995) (citation omitted) ; *see also Crenshaw v. State*, 520 So. 2d 131, 134 (Miss. 1988) (citations omitted) (when the State presents an objectionable comment in closing argument, and the court sustains the objection and instructs the jury to disregard the comment, an appellate court should presume that the jury followed the court's instructions and that the instructions dissipated any prejudicial effect). The court has stated that to preserve an improper remark objection for appeal purposes, the complaining party must have objected at trial and moved for a mistrial if the court failed to take action to neutralize the effect of such an improper argument. *Griffin v. State*, 292 So. 2d 159, 163 (Miss. 1974) (citations omitted). Finally, the court has held that a trial judge has the discretion to determine if a closing comment is so prejudicial that a mistrial should be granted. *Alexander v. State*, 602 So. 2d 1180, 1182 (Miss. 1992) (citation omitted). Where serious and irreparable damage has not occurred, a judge should remedy the situation by admonishing the jury to disregard any impropriety. *Id.* at 1182-83 (citations omitted).

In the present case, Booth objected to the State's comment, and the court instructed the State

to stay within the record and reasonable inferences to be drawn from the evidence. The court also told the jury, when reading the court's instructions, not to be influenced by bias, sympathy, or prejudice, and that its verdict should be based upon the evidence and not upon speculation, guesswork, or conjecture. The court finally told the jurors that arguments, statements, and remarks of counsel were not evidence, and that if any of these had no basis in the evidence, the jury should disregard that argument, statement, or remark.

In the absence of information to the contrary, we presume that the jury followed the court's instructions and properly disregarded any comments not supported by the evidence in this case. Booth did not formally object to the comment, but did lodge his complaint that he believed that the State's comment was improper and prejudicial to his defense. However, the record indicates that the court took appropriate action that it believed was necessary to neutralize any effect that the comment may have had upon Booth's case. Moreover, it appears that Booth was satisfied with the court's action because he did not move for a mistrial, as he should have done if he was not satisfied with the court's action, and if he wished to preserve any right to appeal this particular issue. Finally, we believe that the judge properly exercised his discretion when he: (1) admonished the State to stay within the record and within reasonable inferences drawn from the evidence, (2) did not declare a mistrial on his own initiative, and (3) later instructed the jury to disregard any argument, statement, or remark by either counsel that had no basis in the evidence.

We do not decide whether or not the State's comment was improper. We believe that that determination is irrelevant in light of the court's immediate curative instruction to the State and its

subsequent instructions to the jury to disregard any statement having no basis in the evidence.

Moreover, we believe that the judge properly exercised his discretion when he determined that irreparable damage had not occurred and remedied the situation as he saw fit. The trial court committed no error, and this issue therefore has no merit.

### III. DID THE TRIAL COURT ERR IN ALLOWING THE STATE TO ARGUE IN CLOSING ARGUMENT THAT BOOTH FAILED TO PROVIDE A VOICE ANALYSIS OF THE AUDIOTAPE OF THE SALE TO PROVE THAT THE VOICE ON THE TAPE WAS NOT HIS VOICE?

Booth contends that the State improperly inferred in its closing argument that he had failed to have the audiotape of the drug sale analyzed to exonerate himself as the individual whose voice was on the tape. He believes that this comment was analogous to a comment upon his failure to do something that the State could just have easily done if it had so chosen.

The United States Supreme Court has addressed the issue of a State's response to a defendant's counsel's improper argument. *United States v. Young*, 470 U.S. 1, 12 (1985). The Court said that a reviewing court must consider the likely effect that the State's response would have upon the jury's ability to judge the evidence and that the defendant's counsel's conduct is clearly relevant. *Id.* The Court said that the State should generally not respond to defense counsel's improper argument with a similar improper argument, but that in most cases where this occurs, the State's response does not remove the jury's ability to decide a case on the evidence. *Id.*

The Mississippi Supreme Court has held that when a trial court sustains an objection to an objectionable argument, and the defendant fails to request the court to instruct the jury to disregard it, the court has committed no error. *Perry v. State*, 637 So. 2d 871, 874 (Miss. 1994) (citations omitted); *Marks v. State*, 532 So. 2d 976, 981 (Miss. 1988) (citations omitted) (when an objection is sustained, and the objector fails to request that the jury be told to disregard objectionable matter, no error exists); *Wetz v. State*, 503 So. 2d 803, 810 (Miss. 1987) (defendant did not request the court to instruct the jury to disregard the improper question, after objection was sustained, and court therefore did all that defendant asked it to do); *Graves v. State*, 492 So. 2d 562, 564 (Miss. 1986) (court sustained objection to improper statement and defendant should have requested court to instruct jury to disregard statement but failed to do so; therefore, court committed no error as to the statement).

In the present case Booth's counsel argued in closing that the State failed to analyze the voice on the audiotape, thereby inferring that the State failed to prove that the voice was *his* voice. He stated that a voice analysis was actually better identification of an individual than a fingerprint, and that the State had the burden to produce evidence of this type against a defendant. Finally, he stated that Booth did not have to prove anything. The State responded in its closing argument that, if Booth did not think that his voice was on the tape, he would have had it analyzed himself. The State thereby inferred that Booth did not analyze it because he thought it might be damaging to his defense. Booth objected, and the court sustained his objection and stated that a defendant is presumed innocent and does not have to prove innocence. The court also stated that the State could respond to Booth's argument but

cautioned it to be careful. The State then again reiterated the question "[d]on't you think he would have done that?" to which the court again sustained Booth's objection. The court then stated that neither party should comment on the other's failure to have the voice on the audiotape analyzed.

We believe that the court committed no error because Booth failed to request an instruction to disregard the State's comments. The court did all that Booth requested of it. Moreover, the State was responding to Booth's argument on the exact same subject. We do not find that the State's comments removed the jury's ability to decide this case on the evidence presented. Moreover, we find that the court actually did more than that required, particularly when no request was made, by sustaining Booth's first objection and instructing the jury that Booth was presumed innocent and did not have to prove his innocence. The court therefore instructed the jury although not requested to do so. The court also stated that it would allow the State to respond to Booth's argument but cautioned it to be careful. The court sustained Booth's objection a second time when the State again alluded to the same issue. The court's statement that neither party should comment on the other's failure to analyze the voice on the audiotape was clearly an additional instruction to the jury that this argument was improper. We believe that the court's statements, in effect, instructed the jury twice on the impropriety of the same comments made by both parties. Generally we find no error because, even if the State was merely responding to Booth's closing comment, the court on two occasions cured any prejudice to either party. Specifically, we do not find that the State's comment precluded the jury from weighing and judging the evidence in deciding this case.

#### IV. WAS THE JURY VERDICT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE?

Booth argues that the guilty verdict was against the overwhelming weight of the evidence. He contends that Harrison, a convicted felon who testified for the State, was not a trustworthy witness. He also argues that the audiotape was impossible to understand, that the voices on the tape were barely distinguishable, and that his own voice was not on the tape. Two witnesses who testified on his behalf also stated that Booth's voice was not on the audiotape.

The Mississippi Supreme Court has stated that when an appellate court considers whether a jury verdict is against the overwhelming weight of the evidence, it must accept as true all evidence favorable to the state and supportive of the verdict. *Ellis v. State*, 667 So. 2d 599, 611 (Miss. 1995) (citing *Isaac v. State*, 645 So. 2d 903, 907 (Miss. 1994)). Reversal is justified when the appellate court determines that an abuse of discretion existed in the lower court's denial of a new trial. *Id.*; see also *Eakes v. State*, 665 So. 2d 852, 872 (Miss. 1995) (citations omitted). The court has also held that "[t]he jury is charged with the responsibility of weighing and considering the conflicting evidence and credibility of the witnesses and determining whose testimony should be believed." *McClain*, 625 So. 2d at 781 (citations omitted); see also *Burrell v. State*, 613 So. 2d 1186, 1192 (Miss. 1993) (witness credibility and weight of conflicting testimony are left to the jury); *Kelly v. State*, 553 So. 2d 517, 522 (Miss. 1989) (witness credibility issues are to be left solely to the province of the jury). Furthermore, "the challenge to the weight of the evidence via motion for a new trial implicates the trial court's sound discretion." *McClain*, 625 So. 2d at 781 (citing *Wetz v. State*, 503 So. 2d 803, 807-08 (Miss. 1987)). The decision to grant a new trial "rest[s] in the sound discretion of the trial

court, and the motion [for a new trial based on the weight of the evidence] should not be granted except to prevent an unconscionable injustice." *Id.*

In the present case, the jury heard the witnesses for and the evidence presented by both the State and the defense. The State's evidence showed that Booth was the individual who sold the marijuana to Kitchens. Two defense witnesses testified that they could not identify Booth's voice on the audiotape, while Kitchens stated that it was indeed Booth who sold him the drugs. Testimony presented on behalf of both the State and the Defendant was clearly for the jury to evaluate. The jury's decision to believe the State's evidence and witnesses was well within its discretion. Moreover, the jury was clearly within its power to weigh the evidence and the credibility of the witnesses' testimony and to convict Booth. The trial court did not abuse its discretion by refusing to grant Booth a new trial based on the weight of the evidence. The jury verdict was not so contrary to the overwhelming weight of the evidence that, to allow it to stand, would have been to promote an unconscionable injustice. The trial court properly denied Booth's motion for a new trial.

#### CONCLUSION

We find that the trial court did not err and therefore affirm the jury's verdict and the court's sentence.

**THE JUDGMENT OF THE CIRCUIT COURT OF JASPER COUNTY OF CONVICTION OF THE TRANSFER OF MARIJUANA, LESS THAN ONE OUNCE, AND SENTENCE OF TWO (2) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO APPELLANT.**

**FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND SOUTHWICK, JJ., CONCUR.**